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8  
9 **WORKERS' COMPENSATION APPEALS BOARD**  
10 **STATE OF CALIFORNIA**

11 MARIO ALMARAZ,

12 Applicant,

13 vs.

14 ENVIRONMENTAL RECOVERY  
15 SERVICES (a.k.a. ENVIROSERVE); AND  
16 STATE COMPENSATION INSURANCE  
FUND,

17 Defendants.

Case No. ADJ1078163 (BAK 0145426)

AMICUS CURIAE BRIEF

18 JOYCE GUZMAN,

19 Applicant,

20 vs.

21 MILPITAS UNIFIED SCHOOL  
22 DISTRICT, Permissibly Self-Insured; and  
23 KEENAN & ASSOCIATES, Adjusting  
Agent,

24 Cross-Defendant.

Case No. ADJ3341185 (SJO 0254688)

AMICUS CURIAE BRIEF

25  
26 Amicus Curiae Steve Poizner, Insurance Commissioner of the State of California  
27 (hereinafter "Insurance Commissioner") hereby submits his brief pursuant to the ORDER  
28 GRANTING RECONSIDERATION AND ORDER ALLOWING AMICUS BRIEFS (EN

1 BANC) issued herein on April 6, 2009 by the Workers' Compensation Appeals Board  
2 (hereinafter "Appeals Board") in the above entitled matters.  
3

## 4 INTRODUCTION

5  
6 The Insurance Commissioner files this Amicus Curiae Brief to provide information to  
7 assist the Appeals Board in assessing the effect its decisions have upon injured workers as well as  
8 the employers that pay premiums for workers' compensation insurance and the insurance  
9 companies that are necessary to insure the risk and pay the losses resulting from work injuries. It  
10 can be recalled only a short time ago that insurance rates for workers' compensation were rising  
11 rapidly to pay for increasing and unpredictable costs; that over 20 insurance companies handling  
12 California workers' compensation insurance became insolvent; and many other insurance  
13 companies left California, only to see State Compensation Insurance Fund, as California's  
14 workers' compensation insurer of last resort (see Ins. Code, § 11784(c)), become the largest  
15 writer of workers' compensation insurance in the country, writing the majority of insured  
16 employers in the state and running the risk of becoming insolvent itself. It is within this context  
17 that the Insurance Commissioner urges and requests the decisions of the Appeals Board be  
18 measured in a way so as to allow for adequate and reasonable benefits for injured workers that are  
19 stable and predictable in their cost to the workers' compensation system as mandated by the  
20 Legislature so as to provide for insurance rate adequacy to avoid insurance company insolvency.  
21

## 22 INSURANCE COMMISSIONER'S INTEREST IN THESE MATTERS

23  
24 The Insurance Commissioner is the independently elected official responsible for  
25 regulating the business of insurance in the state and enforcing the execution of the California  
26 Insurance Code. (Ins. Code § 12921.) Those Insurance Code provisions include *inter alia* the  
27 regulation of the business of workers' compensation insurance, supervision of state workers'  
28 compensation insurance rates, and the determination of advisory pure premium rates. (See

1 Chapter 3 of Part 3 of Division 2 of the Insurance Code (Ins. Code §§ 11690, *et seq.*) This  
2 authority emanates from the Constitutional requirement that the Legislature establish through its  
3 plenary power “full provision for adequate insurance coverage against liability to pay or furnish  
4 compensation; full provision for regulating such insurance coverage in all its aspects....” (Cal.  
5 Constitution, Art. XIV, § 4.)

6 The advisory pure premium rates are the cost of insurance per exposure base unit that  
7 represents the loss cost per unit of exposure including loss adjustment expense. (Ins. Code, §  
8 11730.) The overall change to the pure premium rates, which is the percentage change to the  
9 entire costs in the workers’ compensation system, is now designated by the Insurance  
10 Commissioner as the Workers’ Compensation Claims Cost Benchmark. (See Ins. Code, §§  
11 11730, *et seq.* See also Ins. Code, §11750 (b).) In determining the Claims Cost Benchmark, the  
12 Workers’ Compensation Insurance Rating Bureau (hereinafter “WCIRB”), the only licensed  
13 rating organization that reviews loss data on behalf of all insurance companies in the state of  
14 California, including State Compensation Insurance Fund, analyzes how loss costs and expenses  
15 are changing and recommends for the Insurance Commissioner’s approval an adjustment to the  
16 Claims Cost Benchmark for the purposes of workers’ compensation insurance rate making for the  
17 next insurance policy period and to allow the Insurance Commissioner to assess whether the rates  
18 filed by insurance companies are adequate for solvency. (See Ins. Code, § 11732.)

#### 19 20 **THE EFFECT OF THE APPEALS BOARD’S DECISION UPON** 21 **WORKERS’ COMPENSATION INSURANCE RATES**

22 Insurance pure premium rates are established based upon loss costs and the loss  
23 adjustment expenses, as noted above. Once those rates are approved by the Insurance  
24 Commissioner as the Claims Cost Benchmark, workers’ compensation insurance companies file  
25 their own rates with the commissioner and, based upon those rates and the insurer’s underwriting  
26 guidelines, a premium is charged to its insured employers. Since those rates, and in turn the  
27 premiums, are based upon the estimate of costs to be incurred in the future, any changes to those  
28 future loss costs or loss adjustment expenses that create additional unpredicted costs may result in

1 inadequate monies to pay claims, even after taking into account amounts loaded into the rates for  
2 profit, contingencies and investment income.

3 Insurance companies are in the business of dealing with risk. In workers' compensation,  
4 this risk is primarily of an injury occurring to a worker in the employer's workplace. Included in  
5 that is typically the nature and extent of the injury, the associated need for medical treatment and  
6 the cost of resulting indemnity, and the hazards of litigation and determinations of the Appeals  
7 Board in administering the benefit entitlements of the injured worker according to the California  
8 Labor Code. When the limits of the Labor Code, particularly Division 4, become unknown,  
9 insurance rate adequacy can be placed at risk, and insurance company insolvency can develop.

10 The California Legislature has plenary power to establish California's workers'  
11 compensation no-fault system and the benefits to which injured workers are entitled. (Cal.  
12 Constitution, Art. XIV, § 4.) In particular, the Legislature has defined how permanent disability  
13 from a work injury is determined and established the benefits to which injured workers' are  
14 entitled for the permanent disability they may incur resulting from their work injury as set forth in  
15 Labor Code Section 4660.

16 The risk of work injuries and the costs associated with them in the state of California have  
17 been thoroughly analyzed by many experts for insurance companies, the WCIRB, and research  
18 entities such as the Commission on Health Safety and Workers' Compensation [see Labor Code,  
19 § 75 et seq.]. These analyses have resulted in the rates filed by the WCIRB and approved by the  
20 Insurance Commissioner, which include the costs of permanent disability set forth in the Labor  
21 Code and Permanent Disability Rating Schedule (hereinafter "PDRS"). The formal process of  
22 reviewing and allowing public comment on these rates was conducted by the Insurance  
23 Commissioner through a number of hearings, since the time the current PDRS went into effect in  
24 July of 2005.

25 There has been general agreement as to the effect of the PDRS on its cost to the workers'  
26 compensation system. This has been supported through data from the Department of Industrial  
27 Relations, WCIRB, CHSWC, and other organizations, and provided to the Insurance  
28 Commissioner in his rate hearings. The result has been a steady decrease in costs to the workers'

1 compensation system and dramatically declining premiums for employers. Additionally, when  
2 the Administrative Director of the Division of Workers' Compensation reviewed the PDRS and  
3 proposed changes thorough the rule-making process in 2008, the proposed changes were  
4 evaluated by the WCIRB and were quantifiable as to their effect on costs in the worker's  
5 compensation system. In other words, the costs in the workers' compensation system pertaining  
6 to permanent disability benefits were determinable, predictable, and quantifiable.

7  
8 **THE APPEALS BOARD DETERMINATION ESTABLISHES AN**  
9 **UNPREDICTABLE AND POTENTIALLY COSTLY SYSTEM FOR**  
10 **PERMANENT DISABILITY BENEFITS**

11 The decision of the Appeals Board in this matter relies upon holdings pertaining to the  
12 permanent disability system prior to the reforms established in SB 899. In particular, the Appeals  
13 Board has determined that an injured worker may go outside the PDRS when a rating based upon  
14 the American Medical Association Guides to the Evaluation of Permanent Impairment (5<sup>th</sup>  
15 Edition) (hereinafter "Guides") would result in a permanent disability award that would be  
16 "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent  
17 disability." This determination is a rejection of the Legislature's mandate that the PDRS promote  
18 "consistency, uniformity, and objectivity," (Labor Code, § 4660(d)) and will, instead, promote  
19 unpredictability and additional costs and expenses to the workers' compensation system.

20 When the Legislature established the requirements for determining permanent disability  
21 percentages and for the PDRS, it stated that the PDRS is prima facie evidence of the percentage  
22 of permanent disability. (Labor Code, § 4660(c).) This language was similar to the language  
23 before the SB 899 reforms. The Appeals Board, therefore, determined that evidence to rebut the  
24 percentage of permanent disability established by the PDRS would be allowed. However, in  
25 establishing the requirements for permanent disability under the reforms, the Legislature gave a  
26 specific mandate in how the percentage of permanent disability should be determined. The  
27 argument presented by Defendant State Compensation Insurance Fund (hereinafter "State Fund")  
28 directly and adequately addresses the problems the Appeals Boards discussion contains, and,

1 therefore, there is no additional benefit in reiterating those within this brief. However, State  
2 Fund's argument is supported and supplemented by the fact that the Legislature clearly and  
3 directly stated that the schedule shall promote consistency, uniformity, and objectivity in Labor  
4 Code § 4660(d). This is in complete alignment with the requirements of the Insurance  
5 Commissioner in carrying out his obligation in determining the costs in the system to approve  
6 rates for the purposes of adequacy and solvency and to avoid an out of control and costly  
7 insurance system that California experienced just a few years ago.

8  
9 **USE OF GUIDES IS MANDATORY FOR THE NATURE OF**  
10 **PHYSICAL INJURY OR DISFIGUREMENT AND CANNOT**  
11 **BE SUBSTITUTED**

12 The nature of physical injury or disfigurement is required to be described using the  
13 "descriptions and measurements of physical impairments and corresponding percentages of  
14 impairments published in the American Medical Association (AMA) Guides to the Evaluation of  
15 Permanent Impairment (5<sup>th</sup> Edition)." Labor Code § 4660(b)(1). [Emphasis added.] The  
16 Legislature mandated the use of the Guides by using the word "shall," which is mandatory on the  
17 Appeals Board to follow and not discretionary. (Labor Code, §15.) The Legislature also  
18 recognized in its plain language that the Guides were to be used only for descriptions and  
19 measurements of those impairments and the percentage of those impairments. Nowhere in the  
20 language of Labor Code § 4660(b)(1) did the Legislature use the terms "disability," "work  
21 disability," or "work impairment" as the Appeals Board implies in its determination.

22 The Appeals Board has gone to great lengths in its decision to emphasize "disability"  
23 rather than "impairment" in its attempt to discredit the Guides. This includes quotes from the  
24 Guides that clearly recognize that the Guides were not intended to be a measure of "disability" or  
25 "work disability."

26 It is clear that the Legislature knew what it was doing by mandating only the "descriptions  
27 and measurements of physical impairments and corresponding percentages of impairments" as a  
28 description of impairment and not disability. (Labor Code, § 4660(b)(1).) To go outside of this

1 requirement invites disagreement, disputes, and litigation over the descriptions and measurements  
2 and leads to unpredictable results. Again, costs and expenses will increase in the system as  
3 parties go outside the Guides to increase or decrease permanent disability benefits rather than  
4 using the Guides within an expeditious and cost effective process.

5  
6 **THE APPEALS BOARD IS REQUIRED TO PROMOTE**  
7 **CONSISTENCY, UNIFORMITY, AND OBJECTIVITY IN**  
8 **MAKING DETERMINATIONS OF PERMANENT**  
9 **DISABILITY**

10 The Legislature clearly set forth the requirement that the new PDRS shall promote  
11 consistency, uniformity, and objectivity. (Labor Code, § 4660(d).) Again, State Fund has  
12 substantially addressed the problems with the Appeal Board's analysis in this matter. In addition,  
13 the Appeals Board's use of the standard "inequitable, disproportionate, and not a fair and accurate  
14 measure of the employee's permanent disability" conflicts with the Legislature's mandate, and  
15 allows the Appeals Board to substitute its standards for that of the Legislature. Contrary to the  
16 Appeals Board's analysis, this is in fact demonstrated by the Legislature's use of such clear and  
17 unambiguous language in Labor Code § 4660(d) clearly discarding the prior system of rating  
18 permanent disability. (See *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4<sup>th</sup> 1313, 1325  
19 [72 Cal.Comp.Cases 42, 45].) As the Appeals Board is aware, the prior system of permanent  
20 disability contained not just a schedule but an entire additional system of analogous work  
21 preclusions, subjective complaints, and lengthy case law to establish permanent disability. The  
22 Appeals Board's current holding effectively dictates a return to that system, where the parties  
23 dispute the percentage of permanent disability with the use of depositions, expert reports, and  
24 litigation by challenging the PDRS and the Guides to demonstrate they are inequitable,  
25 disproportionate, and not a fair or accurate measure, and thereby move farther away from the  
26 consistency, uniformity, and objectivity that the current PDRS provides for and the Legislature  
27 demanded.

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1 This is not to say that limited exceptions are not allowed. Based upon the language of  
2 Labor Code § 4660(d), and as discussed by the Appeals Board, the PDRS is only prima facie  
3 evidence of the percentage of permanent disability. However, the standards established by the  
4 Appeals Board for parties to rebut and then establish a different percentage of permanent  
5 disability need to be thoughtfully and incrementally established and be supported by reference to  
6 the requirements of Labor Code § 4660 and the PDRS so as to establish consistency, uniformity,  
7 and objectivity. This approach provides for the benefits that injured workers are entitled and  
8 promotes predictability of the costs in the workers' compensation system.

9  
10 **THE DETERMINATIONS OF THE APPEALS BOARD ON**  
11 **THE METHODS OF DETERMINING PERMANENT**  
12 **DISABILITY SHOULD ONLY BE EFFECTIVE**  
13 **PROSPECTIVELY**

14 If the Appeals Board finds on reconsideration and in future proceedings that any part of  
15 the PDRS is revised or modified in an incremental and predictable way, such modification should  
16 only apply prospectively from the Appeals Board's determination and not to cases previously  
17 resolved or subject to being reopened. Labor Code § 4660(d) states in part:

18 The schedule and any amendment thereto or revision thereof shall  
19 apply prospectively and shall apply to and govern only those  
20 permanent disabilities that result from compensable injuries  
21 received or occurring on and after the effective date of the  
22 adoption of the schedule, amendment or revision, as the fact may  
23 be.

24 The Legislature recognized the need for prospective application of changes to the  
25 permanent disability system to promote consistency, uniformity and objectivity. (Labor Code, §  
26 4660(c).) This also leads to predictability and avoids the unintended consequence of imposing  
27 unforeseen and uncalculated risk on an entire insurance system.

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3 **CONCLUSION**

4 The Insurance Commissioner urges the Appeals Board to reevaluate its determinations in  
5 these matters in line with the arguments set forth by State Fund in its Petition for Reconsideration  
6 filed in this matter and as provided in this brief to address the Legislature's clear intent that the  
7 PDRS and determinations of permanent disability be consistent, uniform, and objective. In  
8 addition, any determinations of the Appeals Board whereby the PDRS or methods of determining  
9 permanent disability are revised or altered should be applied prospectively. This approach  
10 promotes the public policy of a predictable and equitable workers' compensation insurance  
11 system for both injured workers and their employers; insurance rate adequacy; and insurance  
12 company solvency.

13 Dated: 5/1/2009

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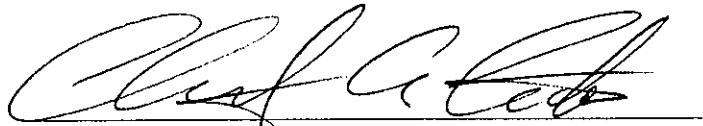
20 By   
21 CHRISTOPHER A. CITKO

22 *Attorneys for Amicus Curiae the Insurance*  
23 *Commissioner of the State of California*  
24  
25  
26  
27  
28

1 VERIFICATION – CCP 446, 2015.5

2  
3 I am the attorney for AMICUS CURIAE STEVE POIZNER, INSURANCE  
4 COMMISSIONER OF THE STATE OF CALIFORNIA in the above-entitled action or  
5 proceeding. I have read the foregoing AMICUS CURIAE BRIEF and know the content thereof.  
6 I certify that the same is true of my own knowledge, except as to those matters which are therein  
7 stated upon my information or belief, and as to those matters I believe them to be true.

8 I declare under penalty of perjury under the laws of the State of California that the  
9 foregoing is true and correct. Executed on May 1, 2009 at Sacramento, California.

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12 CHRISTOPHER A. CITKO  
13 Senior Staff Counsel  
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26 Almaraz vs. Environmental Recovery, et al.  
Case No. ADJ1177048 (SFO 0487779)

27 Guzman vs. Milpitas Unified School District, et al.  
28 Case No. ADJ3341185 (SJO 0254688)

1 PROOF OF SERVICE BY MAIL – CCP 1031a, 2015.5

2 I declare that I am employed in the County of Sacramento, State of California. I am over  
3 the age of eighteen years and not a party to the within entitled cause. On May 1, 2009, I served  
4 the attached **AMICUS CURIAE BRIEF OF STEVE POIZNER,**  
5 **INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA**  
6 on the interested parties in said cause, by placing a true copy thereof, enclosed in an envelope  
7 addressed as follows:

8 Workers' Compensation Appeals Board (HAND DELIVERED)  
9 455 Golden Gate Avenue, 9<sup>th</sup> Floor  
10 San Francisco, CA 94102

11 The Law Offices of William Wolff  
12 940 East Main Street  
13 Santa Maria, CA 93454

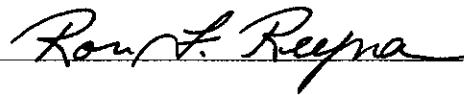
State Compensation Insurance Fund  
Legal Division  
1275 Market Street, 3<sup>rd</sup> Floor  
San Francisco, CA 94103-1410

14 Law Offices of J. Bruce Sutherland  
15 123 Jewell Street, First Floor  
16 Santa Cruz, CA 95060

Law Offices of J. Bradford & Barthel, LLP  
1101 S. Winchester Blvd, Ste. L-237  
San Jose, CA 95128

17 I am readily familiar with the Department of Insurance's practice of collection and  
18 processing correspondence for mailing. Under that practice such envelope would be sealed and  
19 deposited with U.S. postal service on that same day with postage thereon fully prepaid at  
20 Sacramento, California in the ordinary course of business. I am aware that on motion of the party  
21 served, service is presumed invalid if postal cancellation date or postage meter date is more than  
22 one day after the date of deposit for mailing in this affidavit.

23 I declare under penalty of perjury under the laws of the State of California that the  
24 foregoing is true and correct. Executed on May 1, 2009, at Sacramento, California.

25   
26 RON REYNA

27 Almaraz vs. Environmental Recovery, et al.  
28 Case No. ADJ1177048 (SFO 0487779)

Guzman vs. Milpitas Unified School District, et al.  
Case No. ADJ3341185 (SJO 0254688)